MICHAEL RODAK, JR

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973.

No. 73-673

LEO WINTERS,

Petitioner,

vs.

LUTHER BOHANON, JUDGE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA, ET AL.,

Respondents.

PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT AND MOTION FOR A STAY OF PROCEEDINGS PENDING DISPOSITION OF THIS CAUSE BY THIS COURT.

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LUTHER BOHANON, JUDGE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA, ET AL.,

Respondents.

PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

Petitioner, Leo Winters, respectfully requests that this Court issue a writ of certiorari to review the decision of the Court of Appeals for the Tenth Circuit in the instant case.

OPINIONS BELOW.

There were no opinions rendered either in the United States Court of Appeals or the District Court. The memorandum order of the Court of Appeals for the Tenth Circuit (21 Aug. 1973) is reproduced below as Appendix A hereto. The first order of the District Court was made orally (8 June 1973) and

the transcript of proceedings containing that order is set out as Appendix B hereto. The second order of the District Court (11 June 1973) was a written order and is set out as Appendix C hereto.

JURISDICTION.

The order of the Court of Appeals for the Tenth Circuit (Appendix A) was entered on 21 August 1973. By an order dated 21st September 1973, the time for filing this petition for certiorari was extended by Mr. Justice White to and including 20 October 1973. This Court's jurisdiction is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

1. Whether a federal trial court judge, after finding "that the Defendant cannot get a fair and impartial trial in the District," and ruling that "I have no alternative but to transfer" the case under Rule 21 of the Federal Rules of Criminal Procedure, has jurisdiction *sua sponte* to rescind the order of transfer, although the only record event intervening between the original order and its rescission was further critical newspaper publicity of the kind that caused the issuance of the order in the first place?

2. Whether a Court of Appeals can, contrary to the unambiguous findings of fact of the trial court that "the Defendant cannot get a fair and impartial trial in this District," order a case returned to that District for trial despite the command of Rule 21(a) of the Federal Rules of Criminal Procedure?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

1. The Sixth Amendment to the Constitution of the United States provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of

the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

2. Rule 21(a) of the Federal Rules of Criminal Procedure provides:

> **Rule 21. Transfer from the District for Trial.**
>
> **(a) For Prejudice in the District.** The court upon motion of the defendant shall transfer the proceeding as to him to another district whether or not such district is specified in the defendant's motion if the court is satisfied that there exists in the district where the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial at any place fixed by law for holding court in that district.

STATEMENT.

On 31 May 1973, two indictments were returned against petitioner after grand juries of the Western District of Oklahoma had been kept in session for over a year. Petitioner is the Treasurer of the State of Oklahoma, a former Lieutenant Governor, and a leading Democrat in the State. Throughout the life of the grand jury, the news media were rife with major news and editorial coverage reflecting adversely on the petitioner, speculating on and predicting his indictment, for all sorts of reasons or none. In sum, petitioner was indicted and tried by the press in the Western District of Oklahoma long before he was indicted by the federal grand jury.

The petitioner was arraigned on 8 June 1973 before Judge Bohanon, long a resident of the Western District of Oklahoma as well as its federal district judge. At the arraignment, an oral motion for transfer under Rule 21(a) of the Federal Rules of Criminal Procedure was made by petitioner's attorney, Mr.

Stipe. The colloquy between Judge Bohanon, Mr. Stipe, and Mr. Burkett, the United States Attorney, is set forth in full in Appendix B to this Petition. The District Court's findings and ruling were plain and unequivocal:

> "THE COURT: Rule 21 is rather plain. If motion is made in connection with such a matter (reading) transfer from the District for trial for prejudice in the District. The Court upon motion of the defendant shall transfer the proceedings as to him to another District whether or not such District is specified in the defendant's motion, if the Court is satisfied that there exists in the District where the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial at any place fixed by law for holding court in that District.
>
> "That means the Western District of Oklahoma.
>
> * * * * *
>
> "THE COURT: Well, the Court will waive the filing of a brief in this matter. The Court is familiar with all of the newspaper stories. The Court is familiar with all of the complications of this case, and I am convinced that the Defendant cannot get a fair and impartial trial in this District.
>
> "This being true, I have no alternative but to transfer it, unless you have something to convince me to the contrary.
>
> * * * * *
>
> "THE COURT: Well, it will be the order of the Court that this case be transferred to the Eastern District of Oklahoma; and it will also be the order that those who have not filed any motions to transfer will take up any objections you may have with Judge Langley who will preside over this case [in the Eastern District of Oklahoma].
>
> "The Court now extends to all parties thirty days in which to file any other motions or briefs. You will file them with Judge Langley and he will give the motions such consideration and action as he deems proper.
>
> * * * * *
>
> "THE COURT: I will not take up any motions. They will all be heard by Judge Langley, of every kind and character.
>
> * * * * *

> "THE COURT: I am convinced beyond any shadow of a doubt that this District should not try this case. Therefore there is no need in waiting."

Two things are abundantly clear from this colloquy. First, that the adverse publicity was so notorious and damaging to petitioner that the trial judge, who was directly familar with it, was "convinced beyond any shadow of a doubt that this District should not try this case." Second, that the case, to all intents and purposes, was transferred to the Eastern District of Oklahoma as of the date of the arraignment, since the trial judge refused to deal with any other motions or proceedings, but left them all for the court in the Eastern District.

The arraignment and the transfer took place on Friday, 8 June 1973. On Monday, 11 June 1973, the trial judge, apparently *sua sponte*, with no intervening facts of record except a crescendo of criticism from the press whose publications had given rise to Judge Bohanon's order in the first place, vacated the order of transfer.

That the events surrounding the indictment and possible trial in the Western District did involve unusual conditions, presumably of the kind described by Judge Bohanon, was underlined by the fact that despite the current status of the Western District's docket and apparently without an application for relief, the Chief Judge of the Court of Appeals for the Tenth Circuit assigned Judge Wesley E. Brown, Judge of the United States District Court for Kansas, to sit in the Western District of Oklahoma and Judge Bohanon transferred the instant cases to Judge Brown's calendar. These cases appear to be the only cases assigned to Judge Brown.

Petitioner filed a petition for mandamus in the Court of Appeals for the Tenth Circuit to compel the transfer of the case from the Western to the Eastern District of Oklahoma, in accordance with the commands of Rule 21(a) and Judge Bohanon's original order. The Court of Appeals denied the requested relief and added that, if the case had been effectively

transferred to the Eastern District by Judge Bohanon's earlier order, it was ordering the retransfer of the case to the Western District. It is to this judgment that this petition for certiorari is directed.

REASON FOR GRANTING THE WRIT.

The Court of Appeals Has Decided an Important Question of Administration of Federal Criminal Justice in a Way Contrary to the Clear Mandate of Rule 21(a) of the Federal Rules of Criminal Procedure and Inconsistent with Constitutional Decisions of This Court.

Rule 21(a) of the Federal Rules of Criminal Procedure unambiguously states that, on defendant's motion, a trial court "shall" transfer the case to another District if the trial court "is satisfied that there exists in the district where the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial at any place fixed by law for holding court in that district."

The Rule mandates a transfer upon the establishment of two conditions: (1) a request by the defendant, which occurred in this case; and (2) a finding of such great prejudice that a fair and impartial trial could not be available in the district, which occurred in this case. It is respectfully submitted that once those two predicates have been established, the Rule leaves no discretion to the trial court as to whether or not to transfer the case from the prejudice-ridden district.

The failure to recognize the mandatory nature of the Rule is the only basis on which the Court of Appeals could have denied mandamus or ordered a retransfer to the Western District of Oklahoma. The existence of prejudice was established by Judge Bohanon himself at the hearing on 8 June 1973. Nothing in the subsequent proceedings, either in the district court or the Court of Appeals, in any way dissipates Judge Bohanon's finding of prejudice.

Admittedly this is a case of first impression. So far as we could discover, never has a trial court after finding the kind of prejudice described by the Rule, as the trial court here did, ever failed to transfer the case on request of the defendant. Indeed, a court has refused to cancel an order to transfer, even at the suggestion of the defendant who had requested it, after making the finding of prejudice required by the Rule. *United States* v. *Marcello,* 280 F. Supp. 510 (ED La 1968); 423 F. 2d 993 (CA 5th, 1970). We respectfully suggest that there is a basic conflict between the Fifth Circuit's position in the *Marcello* case and the decision reached by the Court of Appeals for the Tenth Circuit here.

Moreover, the fact is that Rule 21 is one of growing importance as a definition of the federal court's obligations to meet the constitutional commands of this Court for securing a fair trial against newspaper interference. This Court has twice in recent years stated the constitutional obligations of state courts to provide transfers for cases that are the undue concern of the press.

In *Groppi* v. *Wisconsin,* 400 U. S. 505 (1971), this Court held unconstitutional a state law because it failed to provide for a change of venue in misdemeanor cases. This Court there pointed out:

> On at least one occasion this Court has explicitly held that only a change of venue was constitutionally sufficient to assure the kind of impartial jury that is guaranteed by the Fourteenth Amendment. That was in the case of *Rideau* v. *Louisiana,* 373 U. S. 723. We held that "it was a denial of due process of law to refuse the request for a change of venue, after the people of Calcasieu Parish has been exposed repeatedly and in depth" to the prejudicial pretrial publicity there involved. 373 U. S., at 726. *Rideau* was not decided until 1963, but its message echoes more than 200 years of human experience in the endless quest for the fair administration of criminal justice. (400 U. S. at 510-11.)

Here the Rules made provision for the change of venue constitutionally compelled by this Court in *Groppi*, but, as in *Groppi* and in *Rideau*, this constitutional right was denied the petitioner, despite the clear finding of prejudice by the trial court judge.

This Court, in *Sheppard* v. *Maxwell*, 384 U. S. 333 (1966), not only asserted the constitutional right for which petitioner contends here and which was denied him by the court below, it also made clear that the obligation of the trial court is to be preventative rather than palliative:

> From the cases coming here we note that unfair and prejudicial news comment on pending trials has become increasingly prevalent. Due process requires that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused. . . . where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another county not so permeated with publicity. . . . But we must remember that reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception. . . . Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures. (384 U. S. at 362-63.)

We respectfully submit that the only construction of Rule 21(a) that is consistent with the commands of this Court in its reading of the Sixth and Fourteenth Amendments in *Sheppard* and *Groppi* is the reading that we have offered here and which was rejected by the court below. That Rule calls for compliance with the constitutional limitations asserted by this Court by commanding transfer where the necessary prejudice is established and the defendant moves for transfer. In a period when "unfair

and prejudicial news comment on pending trials has become increasingly prevalent," the decision of the question proferred by this case should be considered one of first priority for this Court's business.

CONCLUSION.

For the reasons set forth above, Petitioner respectfully requests that this Court issue a writ of certiorari to review and reverse the judgment of the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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. . . . . .

PHILIP B. KURLAND.

APPENDIX A.

July Term—August 21, 1973

Before HONORABLE DELMAS C. HILL, HONORABLE ROBERT H. MCWILLIAMS, and HONORABLE WILLIAM E. DOYLE, *Circuit Judges*

LEO WINTERS,
Petitioner,
vs.
HONORABLE LUTHER BOHANON, Judge of the United States District Court for the Western District of Oklahoma, and
HONORABLE WESLEY E. BROWN, Judge of the United States District Court of Kansas,
Respondents.
UNITED STATES OF AMERICA,
Intervenor.

No. 73-1522

The Court has examined and considered the Petition for Writ of Prohibition and of Mandamus on behalf of the above-named Defendants and is of the opinion that the petitions are wholly without merit and that the same should be denied. The rule to show cause (the peremptory writ) is discharged. The petition seeking a Writ of Prohibition and of Mandamus is denied and the cause is hereby DISMISSED.

In the alternative, it is ORDERED: That District Court cases in issue, United States of America, Plaintiff v. Leo Winters, et

al., Defendants, (Nos. 73-129, 73-130), are hereby assigned and transferred to the United States District Court for the Western District of Oklahoma.

The denial of relief herein is without prejudice to the right of the trial court to whom the cases are assigned to consider the motions for a change of venue or any further motions for change of venue which may be filed together with any and all motions filed on behalf of the Defendants consistent with the dispositions of the motions for change of venue.

We do not here indicate or suggest a viewpoint as to the merits of the change of venue.

The Clerk of this Court shall certify a copy of this Order to the Clerk of the United States District Court for the Western District of Oklahoma and to the Honorable Luther L. Bohanon, as and for the mandate of this Court. The Clerk shall also serve certified copies of this Order upon all counsel of record in this action.

/s/ HOWARD K. PHILLIPS
Howard K. Phillips
Clerk

APPENDIX B.

Mr. Stipe: Your Honor, we would make an oral motion for an extension of time within which to file motions. We feel that the ten day period is inadequate.

Then in addition to that, your Honor, we would like to move that this matter be transferred to another District.

The Court: Do you have any reason?

Mr. Stipe: Yes, sir. I have prepared a written motion and brief on it, your Honor, but I think the Court can take judicial notice of the pretrial publicity, pre-indictment publicity, and I have prepared it for filing, setting forth the detail of it.

The Court: Mr. Burkett, do you have any objection to the motion made by Mr. Stipe to transfer this case to another District?

Mr. Burkett: Your Honor, I'd like very much an opportunity to examine the motion and authorities and respond to it, if I might.

The Court: Well, under the rule—where is that rule, Mr. Rex Holden? What is that, Rule 21?

Mr. Burkett: Rule 21, yes, sir.

The Court: Rule 21 is rather plain. If motion is made in connection with such a matter (reading) transfer from the District for trial for prejudice in the District. The Court upon motion of the defendant shall transfer the proceedings as to him to another District whether or not such District is specified in the defendant's motion, if the Court is satisfied that there exists in the District where the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial at any place fixed by law for holding court in that District.

That means the Western District of Oklahoma.

I will hear you.

Mr. Burkett: I haven't even seen his grounds, your Honor. I haven't seen the motion. Could I—could we examine it? Could we have five days to respond?

Mr. Stipe: I am not required to file a written motion in this matter. It's a matter that is before the Court.

Mr. Burkett: Yes, sir, as a matter of fact the rule of this District require that all motions be filed in writing and supported by a brief. Rule 13 of the Local Rules.

The Court: Well, the Court will waive the filing of a brief in this matter. The Court is familiar with all of the newspaper stories. The Court is familiar with all of the complications in this case, and I am convinced that the Defendant cannot get a fair and impartial trial in this District.

That being true, I have no alternative but to transfer it, unless you have something to convince me to the contrary.

Mr. Burkett: I didn't come prepared to answer any motions, your Honor. I confess it was just oversight on my part. I thought this was just an arraignment.

The Court: Well, it will be the order of the Court that this case be transferred to the Eastern District of Oklahoma; and it will also be the order that those who have not filed any motions to transfer will take up any objections you may have with Judge Langley who will preside over this case.

The Court now extends to all parties thirty days in which to file any other motions or briefs. You will file them with Judge Langley and he will give the motions such consideration and action as he deems proper.

The Court will cut an order and file an order transferring this case to the Eastern District of Oklahoma not later than next week.

Mr. Shelton: Your Honor, does that mean that we file our motions here?

The Court: File all motions and he will consider all of these in the Eastern District.

Mr. Shelton: The Eastern District.

The Court: Yes, sir; thirty days.

Mr. Crowe: If the Court please, I don't know—maybe you are not prepared to rule on my motion for the Grand Jury testimony.

The Court: I will not take up any motions. They will all be heard by Judge Langley, of every kind and character.

Mr. Shelton: Would there be a possibility that Judge Langley would come here to hear the motions, your Honor?

The Court: I have no idea about it. You will have to take that up with him. He can drive a car as well as anybody else. He may be willing to do it, or not. I don't know.

Mr. Burkett: Your Honor, does that order apply to case 73-130 also?

The Court: Both cases. I take it your motion goes to both cases, does it, Mr. Stipe?

Mr. Stipe: Yes, your Honor, it does.

The Court: I am convinced beyond any shadow of a doubt that this District should not try this case. Therefore there is no need in waiting.

(The proceedings are adjourned.)

Certified a True Transcript
July 9, 1973

(Signed) FRANK M. SICKLES, C. S. R.

APPENDIX C.

IN THE UNITED STATES DISTRICT COURT
For the Western District of Oklahoma

UNITED STATES OF AMERICA,
Plaintiff,

vs.

LEO WINTERS, ROBERT G. GROVE, ROSS CUMMINGS, WILLIAM R. BOYINGTON, BARNEY U. BROWN, JR., DONALD F. DICKEY, J. NORMAN FOSTER, ROBERT W. KING, ROBERT C. OWEN, JOHN N. SHEEHAN, RUSSELL E. SWARTS, JR., and HOWARD R. SULLIVANT,
Defendants.

No. 73-130 Cr.

ORDER.

On June 8, 1973, the Court entered an oral Order, upon oral Motion of counsel for defendant Leo Winters, to transfer this cause to another district, alleging that he could not be provided a fair and impartial trial in this district.

The Court, acting upon said Motion, ordered this case to be transferred to the Eastern District of Oklahoma for trial and disposition, feeling that publicity in the case during the years 1972 and 1973 would prevent the defendant Winters from receiving a fair and impartial trial in this district.

The United States Attorney objected and requested time to respond, to file a brief and present evidence in opposition to said motion to transfer this cause as to the defendant Winters.

Upon reconsideration, the Court is of the opinion that its oral Order of June 8, 1973, should be vacated, set aside and held for nought, and that the defendants should be granted until June 18, 1973, in which to file a written Motion as to venue, together with brief; the plaintiff is allowed until June 25, in which to file written response and brief. The Court will thereafter set the matter for hearing and disposition, and

IT IS SO ORDERED.

IT IS FURTHER ORDERED that all of the proceedings in this matter are stayed until further Order of the Court.

Dated this 11th day of June, 1973.

/s/ LUTHER BOHANON
United States District Judge.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973.

No.

LEO WINTERS,

Petitioner,

vs.

LUTHER BOHANON, JUDGE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA, ET AL.,

Respondents.

MOTION FOR STAY OF PROCEEDINGS PENDING DISPOSITION OF THIS CAUSE BY THIS COURT.

Petitioner respectfully requests that this Court order a stay of proceedings in this case pending disposition of this case by this Court. For the reasons set out in the petition for certiorari, petitioner is being compelled to proceed with this case in a venue that is illegal under Rule 21, unconstitutional under the decisions in *Groppi* and *Sheppard, supra,* and before a judge other than the one who may be presiding over the trial when the transfer is properly made. The petitioner will be deprived of his rights to proceed in a proper venue during the time that this petition is pending. Important issues may be resolved in the improper forum before decision in this case by this Court may issue. No injury will be done to respondents by such delay. Indeed, in an atmosphere such as that described by Judge Bohanon in his order of 8 June 1973, *supra,* delay of proceedings

may be required by the constitutional standards set out in *Groppi* and *Sheppard*.

Petitioner has made application to the Court of Appeals for the Tenth Circuit for a stay of proceedings pending disposition of this case on petition for certiorari. That Court summarily denied the stay on 28 August 1973.

Respectfully submitted,

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PHILIP B. KURLAND.

SUPREME COURT, U. S.

FILED

JAN 14 1974

MICHAEL RODAK, JR., CLERK

No. 73-673

In the Supreme Court of the United States

OCTOBER TERM, 1973

LEO WINTERS, PETITIONER

v.

LUTHER BOHANON, JUDGE, UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

ROBERT H. BORK
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-673

LEO WINTERS, PETITIONER

v.

LUTHER BOHANON, JUDGE, UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

The principal issue presented by this petition is whether a district court judge can vacate an oral order transferring venue, before there has been any action by the parties thereon, in order to hear argument and reconsider the necessity for such change of venue.

Petitioner and others are defendants in two cases pending in the United States District Court for the Western District of Oklahoma. In one of those cases, petitioner and three co-defendants are accused of conspiring to violate 18 U.S.C. 1341 (mail fraud) and 18 U.S.C. 1951 (Hobbs Anti-Racketeering Act). In the other case, petitioner and eleven co-defendants are accused of conspiring to violate 18 U.S.C. 656 (misapplication of bank funds).

On Friday, June 8, 1973, petitioner and fourteen co-defendants were arraigned on the two cases. At that time counsel for petitioner orally moved for a change of venue due to pretrial publicity (Arraignment transcript 19-22).[1] The United States Attorney requested five days' time to respond to petitioner's motion and pointed out that the local rules of procedure required such a motion to be in writing and supported by a brief. Judge Bohanon "waived" the requirement for filing a brief and immediately granted the motion.[2] He indicated that he was transferring both cases and *all* defendants to the Eastern District of Oklahoma, that he would file an order to that effect the following week, and that any and all motions should be filed in the Eastern District of Oklahoma (Arraignment transcript 21-22).

The following Monday (June 11, 1973), Judge Bohanon entered a written order in which he stated (Pet. App. C.):

> Upon reconsideration, the Court is of the opinion that its oral Order of June 8, 1973, should be vacated * * * and that the defendants should be granted until June 18, 1973, in which to file a written Motion as to venue, together with brief;

---

[1]None of petitioner's co-defendants had moved for a change of venue, nor did any of them at that time join in the motion for change of venue.

[2]In waiving the requirement for filing a brief, Judge Bohanon stated:

> The Court is familiar with all of the newspaper stories. The Court is familiar with all of the complications in this case, and I am convinced that the Defendant cannot get a fair and impartial trial in this District. [Arraignment transcript 21.]

> the plaintiff is allowed until June 25, in which to file written response and brief. The Court will thereafter set the matter for hearing and disposition * * *.

On June 13, 1973, petitioner, without objecting to Judge Bohanon's order of June 11, filed a written motion for change of venue in compliance with said order. Subsequently, two other co-defendants also filed motions for change of venue (docket sheet).

On July 2, Judge Brown of the United States District Court for Kansas was assigned to the Western District of Oklahoma. Judge Bohanon then transferred the two cases here involved to him (Petitioner's Exhibits 5 and 6 in record on appeal).

On July 19, 1973, Judge Brown set all pending motions for hearing on July 26, 1973. On July 24, petitioner asked the Court of Appeals for the Tenth Circuit to rule that the oral order of June 8, 1973, had divested the Western District of Oklahoma of jurisdiction and cast venue in the Eastern District. The court of appeals dismissed petitioner's claim as "wholly without merit" (Pet. App. A1).[3] Moreover, "[i]n the alternative," the court of appeals held that if, in fact, the district court had lost jurisdiction to vacate its order, it was exercising its supervisory powers to reassign and transfer the case back to the Western Distirct of Oklahoma. The court of appeals further held (Pet. App. A2):

> The denial of relief herein is without prejudice to the right of the trial court to whom the cases

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[3]A hearing on the merits was held on October 24, 1973. At that time Judge Brown denied the motion for a change of venue, with leave to renew after *voir dire*.

> are assigned to consider the motions for a change of venue or any further motions for change of venue which may be filed together with any and all motions filed on behalf of the Defendants consistent with the dispositions of the motions for change of venue.

Petitioner contends that the trial court, having orally granted a change of venue motion, cannot vacate that order the next court day. Petitioner is, in effect, asking this Court to hold that a trial judge, having decided that a ruling he made was incorrect, cannot vacate that ruling even though there has been no detrimental reliance thereon—that, in the context of this case, once the oral order was made, venue was immediately and irrevocably taken from the Western District of Oklahoma and deposited with the Eastern District. There is no merit to this claim.

Judge Bohanon's original ruling was clearly incorrect for several reasons. First, it would have deprived petitioner's co-defendants of their constitutional right to a trial in the "district wherein the crime [was] committed" (Amendment VI, U.S. Constitution). By ordering a transfer as to the non-moving defendants, it also would have violated Rule 21(a) of the Federal Rules of Criminal Procedure, which states that "[t]he court upon motion of the defendant shall transfer the proceeding *as to him* to another district * * *" (emphasis added). Finally, the ruling was clearly contrary to local Rule 13(e), which specifies that a motion pursuant to Fed. R. Crim. P. 21 shall be in writing and supported by a brief.[4]

---

[4]Rule 13(e) of the Rules of the United States District Court for the Western District of Oklahoma provides:

> (e) *Motions in Criminal Cases.* Motions in criminal cases, and particularly motions made pursuant to Rule 7(f), 12, 16,

Having realized his error, Judge Bohanon certainly had the right to correct it, acting as he did before he had even entered a formal order and before any party had time to rely detrimentally thereon and before the case was actually transferred to the Eastern District of Oklahoma. As Judge Learned Hand stated in an analogous situation: "The order [to transfer the action to another district as the more convenient forum] did not affect automatically to transfer the cause; the transmittal of the papers was to be the symbolic act of transfer; and the case was still in the district court * * *" *Magnetic Engineering and Mfg. Co.* v. *Dings Mfg. Co.*, 178 F. 2d 866, 868 (C.A. 2). See also *In re Southwestern Mobile Homes, Inc.*, 317 F. 2d 65 (C.A. 5); *Fischer* v. *United Airlines, Inc.*, 218 F. Supp. 223 (S.D.N.Y.)[5]

21 and 41(e), Federal Rules of Criminal Procedure, shall be in writing and state with particularity the grounds therefor and the relief or order sought. All such motions shall be filed with the Clerk within ten days after arraignment, and a copy served upon the United States Attorney unless a different time is fixed by statute or the Federal Rules of Criminal Procedure. All motions must be accompanied by a concise brief citing all authorities upon which the movant relies. The Court may, however, in its discretion, allow such motions to be made at a time later than that fixed by this Rule.

[5]There is no merit to petitioner's claim (Pet. 7) that there is a conflict among the courts of appeals. The case upon which petitioner relies, *United States* v. *Marcello*, 280 F. Supp. 510 (E.D.La.), affirmed, 423 F. 2d 993 (C.A. 5), certiorari denied, 398 U.S. 959, is inapposite. That case does not hold, as petitioner intimates, that a district court cannot vacate an order transferring venue once a finding of prejudice is made. On the contrary, the district court held that a request by the defendant to vacate an order granting a change of venue (which he had requested) is a matter within the court's discretion. In affirming, the Court of Appeals for the Fifth Circuit reiterated that the trial court "clearly has the power to vacate at Defendant's request an order granting a change of venue. Whether or not he should do so is left to his sound discretion" (423 F. 2d at 1005).

Although authority on this rather obscure point is slight, it is clear that a court generally has the authority to correct an erroneous ruling before any party has been prejudiced thereby. Cf. *Bozza* v. *United States,* 330 U.S. 160. Here, petitioner has not been prejudiced in any way by the judge's action in vacating his order on the next working day following its issuance.

Moreover, even if the district court lacked the power to vacate its original order, here the court of appeals expressly ordered in the alternative (to its denial of the application for a writ of mandamus) that the case be reassigned and transferred to the Western District of Oklahoma, albeit without prejudice to consideration of petitioner's motion for a change of venue in the orderly manner prescribed by the applicable procedural rules. Such action was clearly within the supervisory powers of the court of appeals (*United States* v. *Dooling,* 406 F. 2d 192 (C.A. 2), certiorari denied *sub nom. Persico* v. *United States,* 395 U.S. 911), and petitioner does not argue to the contrary. His argument is that it was improper for the court of appeals to do so here in the face of the so-called "finding" of the district court that petitioner could not get a fair trial in the Western District of Oklahoma. This claim ignores the facts (1) that there is nothing in the record to support such a "finding" and (2) that neither the district court (in vacating the original order) nor the court of appeals purported to rule on the merits of petitioner's claim. The holding of both courts was simply that the motion be presented and decided in an orderly manner.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JANUARY 1974.

JAN 23 1974

MICHAEL RODAK, JR., CLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973.

No. 73-673

LEO WINTERS,

Petitioner,

vs.

LUTHER BOHANAN, JUDGE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA, ET AL.,

Respondents.

REPLY BRIEF TO GOVERNMENT'S MEMORANDUM IN OPPOSITION.

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The petition for certiorari raises no mere technical question of when a district court loses jurisdiction over a case by reason of an order of transfer, as the Government's memorandum in opposition suggests.* The petition instead raises the substantial question of enforcement of the mandates of this Court and Congress under Rule 21 of the Federal Rules of Criminal Procedure—frequently underwritten by this Court's constitutional judgments—that a defendant must not be forced to trial in a district where it is clear to the trial judge that the prejudice against the defendant precludes the possibility of a fair trial.

The trial court made a finding in this case that establishes the predicate that compels transfer. "I am convinced that the

* The Government's cavalier attitude toward petitioner's rights in this case is underlined by the pin-prick of filing the "memorandum in opposition" well after this Court's Rule called for such a filing. U. S. Supreme Court Rules, Rule 24.

Defendant cannot get a fair and impartial trial in this District." (See Memorandum in Opposition, p. 2, n. 2.) This finding was based on the trial court's familiarity "with all of the newspaper stories" and "with all of the complications of this case." (*Ibid.*) Without any change in circumstances except further publicity adverse to the petitioner and the trial judge, resulting from the order of transfer, the trial court reversed its position. No justification was offered. There had been no further communication of record by any of the parties, either orally or in writing, between the order of transfer and the alleged "change of heart."

An important question of the meaning of Rule 21 and this Court's judgments is at stake on this petition. We respectfully submit that the Court should grant the petition for certiorari, reverse the judgment below, and remand the case with instructions to effectuate the transfer as Judge Bohanon commanded. The argument of absence of prejudice to the petitioner by reason of the failure to transfer, suggested by the Government, patently ignores the fact that petitioner is forced to trial proceedings in a district where the prejudice against him was so clear as to command judicial notice.

Respectfully submitted,

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